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FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

FIRST GENERAL COUNSEL'S REPORT

CELA

MUR 6908

DATE COMPLAINT FILED: December 4, 2014

DATE OF NOTIFICATIONS: December 11, 2014

LAST RESPONSE RECEIVED: January 29, 2015

DATE ACTIVATED: June 4, 2015

EXPIRATION OF SOL: July 30, 2019 (earliest)

ELECTION CYCLE: 2014

COMPLAINANT:

American Democracy Legal Fund

RESPONDENTS:

National Republican Congressional Committee and
Keith Davis as Treasurer
American Action Network
American Crossroads and
Caleb Crosby as Treasurer

**RELEVANT STATUTES AND
REGULATIONS:**

52 U.S.C. § 30104(b)¹
52 U.S.C. § 30104(c)(2)(C)
52 U.S.C. § 30116(a)
52 U.S.C. § 30116(f)
52 U.S.C. § 30118(a)
11 C.F.R. § 109.21

INTERNAL REPORTS CHECKED: FEC Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

In the months leading up to the November 2014 elections, employees of the National Republican Congressional Committee ("NRCC") posted polling results for certain congressional races on two anonymous Twitter accounts, @BrunoGianelli44 and @TruthTrain14. Employees of American Action Network ("AAN") and, allegedly, American Crossroads, reviewed the

¹ On September 1, 2014, the Federal Election Campaign Act of 1971, as amended (the "Act") was transferred from Title 2 to new Title 52 of the United States Code.

1 postings. These groups spent millions of dollars in connection with the congressional elections,
2 and the Complaint alleges that the polling data that the NRCC provided influenced their
3 expenditure decisions. The Complaint alleges that the NRCC made in-kind contributions to
4 AAN and American Crossroads when it provided them with the polling results. It further alleges
5 that AAN and American Crossroads financed illegal coordinated communications benefitting the
6 NRCC. Finally, it alleges that these transactions were not reported as required by the Act.

7 The Respondents deny that they violated the Act, but do not directly refute the
8 Complaint's credible material factual allegations. As set forth below, we recommend that the
9 Commission find reason to believe that, by coordinating their activities in the manner alleged,
10 the Respondents made and accepted prohibited, excessive, and unreported in-kind contributions
11 in violation of the Act.

12 II. FACTS

13 A. The Complaint and Responses

14 The Complaint is based on a CNN article published on November 17, 2014.² The article,
15 and a related story released the following day,³ reported that according to a source "with
16 knowledge of the activities," Respondents used Twitter to surreptitiously exchange coded polling
17 results for key congressional races. The source directed CNN to two Twitter accounts,
18 @BrunoGianelli44 and @TruthTrain14, and contended that postings on the accounts "which
19 would look like gibberish to most people," actually conveyed polling results for various

² See Chris Moody, *How the GOP Used Twitter to Stretch Election Laws*, CNN (Nov. 17, 2014), <http://www.cnn.com/2014/11/17/politics/twitter-republicans-outside-groups/>.

³ See Chris Moody, *See the GOP's Coded Tweets*, CNN (Nov. 18, 2014), <http://www.cnn.com/2014/11/18/politics/gop-tweets-screenshots/>. AAN submitted a copy of this article and the accompanying screen shots with its Response. See Brian O. Walsh Aff., Attach. (Jan. 29, 2015).

1 congressional races.⁴ CNN captured screen shots of messages dating back to July 2014, but
2 reported that Respondents apparently had communicated in this manner for several years, with
3 staffers deleting Tweets every few months.⁵ The screen shots captured by CNN are the only
4 record of the messages currently available, as the Twitter accounts were deleted immediately
5 after CNN contacted the NRCC regarding the source's assertions on November 3, 2014.⁶

6 The Complaint alleges that Respondents' exchange of non-public polling data via Twitter
7 enabled the NRCC to provide inside information to outside groups to inform their evaluations
8 regarding which congressional races to target.⁷ The Complaint contends that when the NRCC
9 posted a message showing that a particular race was close, American Crossroads and AAN
10 "would then know to devote more spending, resources, and time on that race."⁸ At the same
11 time, "if the NRCC posted a Twitter message showing a particular congressional candidate
12 polling significantly ahead of his opponent, the groups would know that the party viewed the
13 candidate as 'safe,' and that they should not target spending on that race."⁹

14 The Complaint further alleges that "[b]y hiding their communications on a public
15 website, Respondents intentionally tried to create a loophole in the coordination rules."¹⁰ It
16 details Respondents' apparent efforts to conceal their activities, alleging that: (1) Although each

⁴ Chris Moody, *How the GOP Used Twitter to Stretch Election Laws*, CNN (Nov. 17, 2014),
<http://www.cnn.com/2014/11/17/politics/twitter-republicans-outside-groups/>.

⁵ Compl. at 3 (Dec. 4, 2014); Chris Moody, *How the GOP Used Twitter to Stretch Election Laws*, CNN
(Nov. 17, 2014), <http://www.cnn.com/2014/11/17/politics/twitter-republicans-outside-groups/>.

⁶ *Id.*

⁷ Compl. at 3-4.

⁸ *Id.* at 4.

⁹ *Id.* at 3-4.

¹⁰ *Id.* at 6-7.

1 Respondent has an official Twitter page, the accounts used for posted polling data were not
2 linked in any way to these official accounts; (2) Respondents used "an encoded format" for the
3 Tweets "so that any person unfamiliar with the formula Respondents used to organize the
4 information, including members of the public, would be unable to decipher what the posts
5 meant;" and (3) "Respondents deleted both Twitter accounts minutes after CNN contacted the
6 NRCC with questions in an apparent attempt to cover up their activities."¹¹

7 The NRCC filed a response admitting that its employees posted polling results on Twitter
8 under the accounts @BrunoGianelli44 and @TruthTrain14.¹² Using a Tweet posted by
9 @TruthTrain14, the NRCC explained how to decipher the postings, each of which provided
10 polling results for a specific congressional race using a particular format of letters and
11 numbers.¹³

12 IL-39/37-37/36-28/10-36/19-44/51-7/21/14-12

13 According to the NRCC, the first two letters and the last number signal the congressional
14 district at issue (here, Illinois's 12th district).¹⁴ The NRCC interpreted the rest of the post as
15 follows:

16 The first set of numbers, "39/37" is the generic ballot result. (The generic
17 ballot question is, "If you voted today, would you vote for the Republican
18 candidate or the Democratic candidate for the U.S. House?") The next set
19 of numbers represents the head-to-head matchup of the two U.S. House
20 candidates. In the example above, the Republican candidate would
21 receive 37% of the vote, while the Democratic candidate would receive
22 36%. The next three sets of numbers are favorable/unfavorable ratings.
23 "28/10" indicates that 28% of respondents view the Republican candidate

11 *Id.* at 3.

12 NRCC Resp. at 3 (Jan. 28, 2015).

13 *Id.*

14 *Id.*

1 favorably, while 10% hold an unfavorable view of the Republican
2 candidate. "36/19" provides the same information for the Democratic
3 candidate. "44/51" represents the President's favorable./ unfavorable
4 ratings. "7/21/14" is the date the poll was taken, July 21, 2014.¹⁵

5 The NRCC does not explain why its employees used anonymous accounts to post polling results
6 or address whether it communicated with AAN and American Crossroads as the Complaint
7 alleges, but denies that it illegally coordinated with the other Respondents.¹⁶

8 AAN, in turn, admits that it was aware of, and periodically reviewed, the poll results that
9 the NRCC posted on Twitter,¹⁷ stating that it used the information "merely as a data point to
10 compare against AAN's own polls."¹⁸ AAN denies that it coordinated with the NRCC, asserting
11 that it "did not communicate with the NRCC about how Twitter polls should affect AAN's
12 independent expenditures."¹⁹ AAN's response, which included a sworn affidavit from its
13 President, Brian O. Walsh, does not explain how AAN's employees learned that the anonymous
14 Twitter accounts existed and how to decipher the meaning of the posts, or address the
15 Complaint's allegations that AAN must have communicated with the NRCC to find and
16 understand the meaning and significance of the information that the NRCC posted.

17 American Crossroads submitted a response with sworn affidavits from its President/CEO,
18 Steven J. Law, and Political Director, Carl Forti. The Response does not directly refute the
19 Complaint's conduct allegations, however, instead asserting that because the affiants are
20 "American Crossroads' decision makers" and the two of them "did not view the Twitter accounts

¹⁵ *Id.*

¹⁶ *Id.* at 2. The NRCC does not contend that the staff who engaged in the conduct at issue here acted outside the scope of their authority as NRCC employees.

¹⁷ AAN Resp. at 4 (Jan. 29, 2015) ("AAN personnel periodically reviewed polling information publicly available on Twitter, including that which is the basis for the Complaint in this matter.").

¹⁸ *Id.* at 14.

¹⁹ Walsh Aff. ¶¶ 4, 18.

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1 or messages at issue . . . the conduct prong of the Commission's coordinated communication
2 regulation could not possibly have been satisfied."²⁰ Law and Forti state that they "make all
3 strategic decisions" regarding American Crossroads's communications, that they personally do
4 not use Twitter, and that they did not view the messages at issue until after the Complaint was
5 filed.²¹ They also assert that they personally did not communicate about the Twitter accounts
6 with the NRCC or AAN.²² The Response acknowledges that "Mr. Law and Mr. Forti solicit
7 input and recommendations from staff and consultants,"²³ but does not address whether any of
8 American Crossroads's staff or consultants reviewed the Twitter posts or discussed them with
9 the other Respondents as alleged in the Complaint, or even whether the affiants themselves knew
10 that the NRCC was distributing polling results in this manner.

11 All of the Respondents argue that the poll results were publicly available because they
12 were posted on Twitter, and as a result, should be exempt from the applicable regulations.²⁴
13 They further argue that the Complaint does not adequately allege any violations of the Act and is
14 insufficient because its allegations are speculative, implausible, and "based solely on a news
15 report featuring an anonymous source."²⁵

16 **B. The NRCC's Tweets and AAN and American Crossroads's Expenditures**

17 Our analysis of CNN's screen shots and AAN and American Crossroads's reports to the
18 Commission indicates that from July 30, 2014, the NRCC posted polling data for at least 51

²⁰ American Crossroads Resp. at 4 (Jan. 28, 2015).

²¹ See Steven J. Law Aff. ¶¶ 2-3 (Jan. 27, 2015); Carl Forti Aff. ¶¶ 2, 3.

²² See Law Aff. ¶ 4; Forti Aff. ¶ 4.

²³ American Crossroads Resp. at 2.

²⁴ See, e.g., NRCC Resp. at 5-7; AAN Resp. at 11-12; American Crossroads Resp. at 4.

²⁵ See, e.g., NRCC Resp. at 4-5.

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1 congressional races, and AAN and American Crossroads reported making independent
2 expenditures in 13 of them.²⁶ For every race in which the NRCC tweeted polling results and
3 AAN, American Crossroads, or both reported independent expenditures on or after July 30,
4 2014, the NRCC tweeted polling data before the expenditures were made.

5 These particular expenditures represent a significant portion of the total spending of AAN
6 and American Crossroads in the 2014 congressional elections. For example, AAN reported
7 \$8.97 million in independent expenditures targeting congressional candidates in 2014. Between
8 September 30 and November 3, AAN spent more than \$1.3 million in connection with the race in
9 New York's 1st district, for which the NRCC posted polling results on August 15, September 13
10 and 30, and October 13 and 14.²⁷ Similarly, American Crossroads reported more than
11 \$2.9 million in independent expenditures in connection with the 2014 congressional elections.
12 The NRCC posted polling results for Arkansas's 2nd district on August 27 and October 3, 13,
13 and 14, while American Crossroads spent approximately \$1.42 million in the same district
14 between October 3 and October 17 — nearly half of all of its spending on congressional races for
15 the 2014 cycle.²⁸ Overall, of the approximately \$11.9 million that AAN and American
16 Crossroads spent in 2014's congressional races, more than \$9.4 million targeted candidates in

²⁶ Because the Complaint alleges (and Respondents do not dispute) that the Tweets captured in CNN's screen shots are only a subset of the postings made on the anonymous accounts, and because the accounts were reportedly deleted immediately after CNN contacted the NRCC regarding the matter, a full analysis of the information posted on the Twitter accounts is not possible at this stage.

²⁷ Chris Moody, *See the GOP's Coded Tweets*, CNN (Nov. 18, 2014), <http://www.cnn.com/2014/11/18/politics/gop-tweets-screenshots/>.

²⁸ *Id.* According to its disclosures to the Commission, American Crossroads made expenditures in connection with five congressional races. This is inconsistent with its Response, however, which states that "American Crossroads made independent expenditures in connection with three U.S. House Elections in 2014" and omits mention of the expenditures in Arkansas. American Crossroads Resp. at 3.

1 districts for which we have been able to confirm that the NRCC tweeted polling results in
2 advance based on the information available at this stage of the Commission's proceeding.²⁹

3 III. LEGAL ANALYSIS

4 A. The Polling Results Were Not Publicly Available

5 A threshold issue in this case is whether the NRCC's polling results were "publicly
6 available" because they were communicated via Twitter. As discussed below, this determination
7 affects the analysis for nearly all of the alleged violations. The Complaint contends that the
8 polling information was not publicly available because it was posted on anonymous Twitter
9 accounts and "encrypted" such that it was useful only to those who knew how to find and
10 "decipher" it.³⁰

11 Respondents disagree, reasoning that because Twitter is a well-known and publicly
12 accessible resource, any information that the outside groups may have obtained from the
13 NRCC's postings "was, by definition, information 'obtained from a publicly available source.'"³¹
14 They note that the Commission has included "materials on a candidate's Web site or other
15 publicly available web site" as an example of publicly available information.³² Respondents
16 assert, therefore, that "[a]ny message posted on Twitter — by any person at any time regarding

²⁹ See Compl. at 3; see also Chris Moody, *How the GOP Used Twitter to Stretch Election Laws*, CNN (Nov. 17, 2014), <http://www.cnn.com/2014/11/17/politics/twitter-republicans-outside-groups/>. Although it admits that two NRCC employees created and used the Twitter accounts at issue, the NRCC does not address the Complaint's assertions that the employees periodically deleted previously posted Tweets and that the accounts themselves were deleted "minutes" after CNN contacted the NRCC regarding the matter. It does acknowledge that CNN's screenshots did not capture all of the postings on the two accounts, stating that "[a]t this time, we do not have access to either account's messages and cannot produce the messages not published by CNN." NRCC Resp. at 3.

³⁰ Compl. at 6.

³¹ NRCC Resp. at 7.

³² *Id.* at 6 (quoting Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006) (explanation and justification) ("Coordinated Communications E&J")).

1 any subject — constitutes publicly available information,” such that “a message posted on
2 Twitter cannot serve as the basis for impermissible coordination,”³³ regardless of “[t]he number
3 of people aware of the information and its clarity.”³⁴

4 Respondents’ arguments are unpersuasive. The polling data here was not available to the
5 public because members of the public, without inside information, could not reasonably locate it
6 or understand it. Although the Commission’s regulations may not expressly “ask whether the
7 information was ‘hidden’ or ‘could be understood by the public,’”³⁵ those inquiries are central to
8 the regulatory distinction between exchanges that are public and those that are private. Here, the
9 Respondents sought to conceal both the meaning of the polling data and the fact that it was being
10 conveyed, posting facially meaningless numerical arrangements on innocuous accounts
11 unconnected to the NRCC among hundreds of millions of Tweets published each day.³⁶ In so
12 doing, they converted a public channel of communication into a private one.

13 Nonetheless, the Respondents contend that exchanging encoded information via
14 unattributed Twitter accounts is no different than accessing public information on any public
15 website, relying on the Commission’s Coordinated Communications E&J.³⁷ The comparison is

³³ NRCC Resp. at 2.

³⁴ AAN Resp. at 12; *see* NRCC Resp. at 6-7. Respondents also cite several matters in which the “safe harbor” for publicly available information was addressed. *See, e.g.*, NRCC Resp. at 6-7. The cases cited by Respondents are readily distinguishable from the facts here. For example, in MUR 6120 (White for Congress), the safe harbor for publicly available information applied where the groups paying for advertisements asserted that they found images of a candidate by performing online searches for his name, just as any other member of the general public might. And in MUR 6038 (Lamborn) the information at issue (the names and addresses of absentee voters) was itself a public record. In this case, the outside groups do not claim to have found the information — and indeed, could not have done so — without the NRCC’s guidance.

³⁵ NRCC Resp. at 6.

³⁶ As of June 30, 2015, Twitter estimated that there were 316 million monthly active users, with 500 million Tweets sent per day. *See Twitter Usage/Company Facts*, TWITTER, <https://about.twitter.com/company>.

³⁷ NRCC Resp. at 6 (quoting Coordinated Communications E&J at 33,205).

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1 misplaced. The illustration in the E&J acknowledges the unremarkable proposition that
2 materials made available to all and not dependent on private communications — such as public
3 commentary on a public website — would constitute “publicly available” information. Indeed,
4 the NRCC operates in its own name both a public website and a “verified” Twitter account.³⁸
5 But here the NRCC did not offer its polling results to the public generally. It concealed that
6 information in unconnected accounts using a private cipher, the internet equivalent of a dead
7 drop.³⁹ Such secret exchanges remain private even when the information conveyed is hidden in
8 plain sight.

9 Moreover, the circumstances reflect that the NRCC must have had private discussions
10 with AAN and American Crossroads for them to find the polling results. Notwithstanding the
11 availability of search engines for internet and Twitter content, a member of the public could not
12 have found the poll results online by looking for NRCC polling data or any other reasonably
13 related search terms.⁴⁰ The Responses themselves support the same conclusion. The NRCC

³⁸ See Compl. at 3. Unlike the two unattributed Twitter accounts at issue here — the contents of which the NRCC allegedly deleted regularly before erasing the accounts entirely when discovered — the NRCC has operated a “verified” Twitter account in its own name since April 2007, describes the purpose of the organization and provides a link to its public website on the account’s masthead, and has preserved a feed of thousands of historical Tweets on the verified account that remain presently accessible. See <https://twitter.com/NRCC> (last visited Nov. 3, 2015).

³⁹ Leaving a hidden message in a “public” place where only select individuals will notice it or understand it is a classic method of covert information exchange. See, e.g., NIGEL WEST, HISTORICAL DICTIONARY OF INT’L INTELLIGENCE 218 (Rowman & Littlefield 2d ed. 2015) (describing clandestine system employed during World War II by which innocuous personal messages were broadcast in public BBC radio bulletins with hidden pre-arranged meanings known to recipients in enemy-occupied territory); Press Release, FBI (Feb. 20, 2001), <https://www.fbi.gov/about-us/history/famous-cases/robert-hanssen> (describing arrest of FBI agent at a public Virginia park where he was “clandestinely placing a package containing highly classified information at a pre-arranged, or ‘dead drop,’ site for pick-up by his Russian handlers”).

⁴⁰ AAN’s Response notes that a Google search for “NJ-03 twitter” will return “Tweets regarding politics in the third congressional district of New Jersey.” AAN Resp. at 2-3. But such a search would not have returned any of the Tweets at issue here, since the state and congressional district were separated in the NRCC’s postings, and they contained no “hashtags” or other key terms that might register in searches. Moreover, Twitter postings were not indexed for Google searches until May 2015. See Jana Messerschmidt, *A New Way to Discover Tweets*, TWITTER (May 19, 2015), <https://blog.twitter.com/2015/a-new-way-to-discover-tweets>.

1 states that "[t]he Twitter accounts identified in CNN's report (@BrunoGianelli44 and
2 @TruthTrain14) were created and used by two NRCC employees."⁴¹ And AAN acknowledges
3 that "AAN personnel periodically reviewed the Twitter polls that are the basis for the Complaint
4 in this matter," and referred to the information as part of its process of examining "available
5 polling data publicly released by polling firms, the press, candidates and their opponents,
6 Democrat and Republican party committees and others observing the campaign."⁴² It stands to
7 reason that AAN would not rely on polling data from anonymous Twitter accounts without
8 knowing its source. Further, neither the NRCC nor AAN seeks to explain how AAN found the
9 posts and concluded that they warranted periodic review absent such a private understanding.

10 Respondents also disagree with the Complaint's characterization of the postings as
11 "encoded."⁴³ They contend that the posts are "immediately recognizable as 'topline' polling data
12 to anyone who is reasonably familiar with polling data."⁴⁴ As support for this contention, the
13 NRCC cites a *Washington Post* article characterizing the Tweets as "lightly coded messages,"⁴⁵
14 and asserts that the writer of the article, "with no acknowledged assistance from polling
15 professionals, was able to explain the meaning of the messages to readers."⁴⁶

16 As the article relied upon by the NRCC demonstrates, however, inside information was
17 necessary to accurately translate the NRCC's Tweets. Even with the specialized knowledge that

⁴¹ NRCC Resp. at 3.

⁴² Walsh Aff. ¶ 11.

⁴³ Compl. at 7.

⁴⁴ NRCC Resp. at 3.

⁴⁵ *Id.* (citing Philip Bump, *Republicans, Twitter and the Brave New World of Campaign / Outside Group Coordination*, WASH. POST (Nov. 17, 2014), <http://www.washingtonpost.com/news/the-fix/wp/2014/11/17/republicans-twitter-and-the-brave-new-world-of-campaignoutside-group-coordination>).

⁴⁶ *Id.*

1 the numbers represented polling results and that the NRCC in particular commissioned the poll at
2 issue, the article's interpretation of the polling data differs substantially from the NRCC's
3 explanation. For example, the article asserts that it is "safe to assume" that the first numbers in
4 each post signified the "overall split among voters" between each party's candidate, but
5 according to the NRCC, these numbers represented the generic ballot matchup based on party
6 affiliation (i.e., "If you voted today, would you vote for the Republican candidate or the
7 Democratic candidate?"); the article speculates that the rest of the numbers are "probably a
8 breakdown by ethnicity or gender," but the NRCC has explained that they actually reflect head-
9 to-head results (or the "overall split") between the actual candidates, followed by favorability
10 ratings; and the reporter guesses that the code "2w" in a post signals the poll results from two
11 weeks earlier, but the NRCC explains that each post includes the date the poll was taken.

12 In sum, while Twitter itself is a public website, the NRCC's messages were not intended
13 for or directed to the general public. The polling results could not be found by conventional
14 searching or accurately decoded by those not privy to the Respondents' private key. The
15 information the NRCC posted on Twitter was therefore not available to the public.⁴⁷

⁴⁷ As noted, the NRCC allegedly deleted its posts to the challenged accounts every few months and deleted the accounts entirely immediately after CNN's inquiry. Compl. at 3. If true, the NRCC itself may have recognized that using Twitter to convey information to an outside spending group in a manner that requires a private arrangement to find and interpret it does not render the information "publicly available" under the Commission's regulations. *Cf. United States v. Johnson*, 553 F. Supp. 2d 582, 620 (E.D. Va. 2008) (recognizing that attempt to delete e-mails or other evidence may constitute probative evidence of consciousness of guilt). Regarding the mental state of the Respondents acting through their agents, we will make any appropriate recommendations once the record is further developed as proposed below. See *infra* Part IV.

B. There Is Reason to Believe the Polling Results Were In-Kind Contributions and Provided for the Purpose of Furthering Expenditures

The Complaint alleges that the polling results posted on Twitter were in-kind contributions from the NRCC to AAN and American Crossroads.⁴⁸ The Act specifies that a "contribution" includes "anything of value made by any person for the purpose of influencing any election for Federal office."⁴⁹ The Act also specifies that "accepted" opinion poll results are in-kind contributions when given to a political committee such as American Crossroads.⁵⁰ "Acceptance" occurs when a committee requests the results, uses the results, or simply does not notify the contributor that the results are refused.⁵¹

The Act requires political committees such as the NRCC and American Crossroads to file regular disclosure reports in accordance with the provisions of 52 U.S.C. § 30104. Committees must disclose itemized breakdowns of receipts and disbursements, including the name and address of each person who has made any contribution or received any disbursement in an aggregate amount or value in excess of \$200 within the calendar year, together with the date and amount of any such contribution or disbursement.⁵²

⁴⁸ Compl. at 2.

⁴⁹ 52 U.S.C. § 30101(8)(A)(i).

⁵⁰ 11 C.F.R. § 106.4(b). The Act contains an exception for certain public poll results: A group's acceptance of any opinion poll results that have been made public prior to receipt without request, prearrangement, or coordination by the recipient does not result in an in-kind contribution. 11 C.F.R. § 106.4(c). That exception does not apply here because the poll results were not actually publicly available, as addressed above. And even if the NRCC's Twitter postings could conceivably be regarded as making the poll results "public," the facts here suggest that there was "prearrangement" between the Respondents in connection with putting the polling data online.

⁵¹ 11 C.F.R. § 106.4(b).

⁵² 52 U.S.C. § 30104(b)(2)-(6); 11 C.F.R. § 104.3(a)(3)-(4), (b)(2)-(4). A political committee must report all contributions (including in-kind contributions) that it receives, as well as those that it makes to other political committees. 52 U.S.C. § 30104(b)(2), (4); 11 C.F.R. § 100.52(d)(1).

1 AAN is an incorporated entity not registered as a political committee, and therefore it
2 need not file regular financial disclosure reports with the Commission. However, the Act
3 requires persons other than political committees to report independent expenditures when they
4 aggregate in excess of \$250 for a calendar year.⁵³ As relevant here, an "independent
5 expenditure" includes an expenditure for a communication that expressly advocates the election
6 or defeat of a clearly identified federal candidate "that is not made in concert or cooperation with
7 or at the request or suggestion of . . . a political party committee or its agents."⁵⁴ The
8 Commission's implementing regulation provides that an independent expenditure report must
9 include, among other things, "the identification of each person who made a contribution in
10 excess of \$200 to the person filing such report, which contribution was made for the purpose of
11 furthering the reported independent expenditure."⁵⁵

12 Here, there is reason to believe that the contribution and receipt of the polling results
13 should have been reported by each of the three Respondents. The NRCC admits that its staffers
14 delivered polling results via anonymous Twitter accounts, and AAN admits that it received and
15 reviewed those results.⁵⁶ Although American Crossroads has not conceded that fact, the record
16 nonetheless supports a reasonable inference that, like AAN, American Crossroads accepted the
17 polling results. The same source with knowledge of events that correctly identified AAN as a
18 recipient of the polling information also specifically named American Crossroads as one of the

⁵³ 52 U.S.C. § 30104(c).

⁵⁴ 52 U.S.C. § 30101(17).

⁵⁵ 11 C.F.R. § 109.10(e)(1)(vi).

⁵⁶ AAN Resp. at 4.

involved entities.⁵⁷ The admissions of the NRCC and AAN confirming their alleged roles, taken with American Crossroads's failure to rebut the specific allegations concerning its involvement while denying other facts in the Complaint, tends to suggest that American Crossroads, through members of its staff, may have reviewed the NRCC's covertly posted polling data. Moreover, in districts where the NRCC posted polling results and American Crossroads spent money, the former occurred before the latter — also consistent with the Complaint's allegations. Taken together, these facts reasonably suggest that, like AAN, American Crossroads may have reviewed the anonymous Twitter postings and in doing so accepted the in-kind contributions.⁵⁸

The NRCC did not report any contributions or disbursements made to American Crossroads in 2014, and neither AAN nor American Crossroads reported receiving any contributions from the NRCC in their respective filings with the Commission. Because the NRCC and American Crossroads are political committees registered with the Commission, they were required to report the making and acceptance of the poll results as in-kind contributions. And as to AAN, the Complaint alleges that the NRCC provided the poll results to influence AAN's decisions regarding its reported expenditures.⁵⁹ As noted, for every race in which there is overlap between the NRCC's Tweets and AAN's expenditures on or after July 30, 2014 (the date of the earliest posting captured by CNN's screen shots), the NRCC posted polling results at least once before AAN funded any communications. The inference that the NRCC intended for

⁵⁷ See Chris Moody, *How the GOP Used Twitter to Stretch Election Laws*, CNN (Nov. 17, 2014), <http://www.cnn.com/2014/11/17/politics/twitter-republicans-outside-groups/>.

⁵⁸ See, e.g., Statement of Policy Regarding Comm'n Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007) ("A 'reason to believe' finding followed by an investigation would be appropriate where a complaint credibly alleges that a significant violation may have occurred, but further investigation is required to determine whether a violation in fact occurred and, if so, its exact scope.").

⁵⁹ See, e.g., Compl. at 4.

1 its polling data to influence the manner in which AAN funded communications in particular
2 districts at particular times is reasonable, especially as the NRCC has not offered any alternative
3 reason for transmitting the polling results in the manner it did, which AAN admits it reviewed.
4 There is a fair basis to conclude, therefore, that AAN should have reported the receipt of the
5 polling results from NRCC on its independent expenditure reports filed with the Commission.⁶⁰

6 **C. There Is Reason to Believe that Respondents Coordinated Certain Public**
7 **Communications in Violation of the Act**

8 The Complaint alleges that AAN and American Crossroads used the NRCC's polling
9 results to "target" districts on which to "devote more spending, resources and time."⁶¹ As a
10 result, the Complaint asserts that communications in those districts that AAN and American
11 Crossroads funded and reported as "independent" expenditures were actually coordinated with
12 the NRCC — and, as such, were unreported in-kind contributions made in violation of the Act.⁶²

13 A communication is coordinated with a political committee when it: (1) is paid for by a
14 person other than the committee (the "payment prong"); (2) satisfies at least one of the content
15 standards set forth in 11 C.F.R. § 109.21(c) (the "content prong"); and (3) satisfies at least one of
16 the conduct standards set forth in 11 C.F.R. § 109.21(d) (the "conduct prong"). Coordinated

⁶⁰ 52 U.S.C. § 30104(c)(2)(C). Alternatively, as addressed below, AAN and the NRCC may have coordinated the public communications that are the subject of AAN's independent expenditure reports. If so, AAN would not have violated its independent expenditure reporting obligations by failing to identify the NRCC, because the reported expenditures would not have been "independent" and should not have been reported as such at all. *See, e.g.,* 11 C.F.R. § 100.16(a) (excluding coordinated communications from the definition of independent expenditures). This issue will require additional fact finding to resolve. Accordingly, given the preliminary stage of the enforcement process in this matter, we recommend that the Commission find reason to believe as to each of the alleged violations in the alternative.

⁶¹ Compl. at 4.

⁶² *Id.* at 2.

1 communications are in-kind contributions from the party paying for such communications to the
2 committee with which the communications are coordinated.⁶³

3 1. The Payment and Content Prongs are Satisfied

4 The payment prong of the coordinated communications test is met if the communication
5 is paid for by a person other than the political party committee.⁶⁴ It is satisfied here because all
6 of the communications reported for the relevant districts were paid for by AAN or American
7 Crossroads.⁶⁵

8 The content prong is satisfied if the communication is a "public communication . . . that
9 expressly advocates . . . the election or defeat of a clearly identified candidate for Federal
10 office."⁶⁶ AAN and American Crossroads reported that the communications at issue here were
11 "independent expenditures." Those communications therefore "expressly advocat[ed] the
12 election or defeat of a clearly identified candidate," thus satisfying the content prong.⁶⁷

13 2. There Is Reason to Believe that the Conduct Prong is Satisfied

14 The Commission's regulations set forth six types of conduct between the person
15 financing the communication and the political party committee that satisfy the conduct prong of
16 the coordination standard.⁶⁸ As discussed below, it is not necessary for the groups to have

⁶³ 11 C.F.R. § 109.21(b).

⁶⁴ 11 C.F.R. § 109.21(a)(1).

⁶⁵ See Compl. at 5; AAN Resp. at 7-8 (conceding that the payment prong is satisfied).

⁶⁶ 11 C.F.R. § 109.21(c)(3).

⁶⁷ See 11 C.F.R. § 100.16(a); see also AAN Resp. at 7-8 (conceding that the content prong is satisfied); Compl. at 5.

⁶⁸ See 11 C.F.R. § 109.21(d).

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discussed the details of any specific communication for it to be coordinated. We conclude that three of the regulations' six conduct requirements may be met here.⁶⁹

a. Material Involvement

The "material involvement" standard is satisfied here if the NRCC was materially involved in decisions regarding either (1) a communication's content; (2) the intended audience for the communication; (3) the means or mode of the communication; (4) the specific media outlet for the communication; (5) the timing or frequency of the communication; or (6) the size or prominence of the printed communication or the duration by broadcast, satellite, or cable.⁷⁰ The Commission has opined that this standard may be met even absent a "'discussion' or some form of interactive exchange between the candidate and the person paying for the communication." For example, "a candidate is materially involved in a decision regarding the content of a communication paid for by another person if he or she has a *staffer deliver to that person the results of a polling project* recently commissioned by that candidate, and the *polling results are material to the payor's decision regarding the intended audience for the communication.*"⁷¹ Likewise, simply faxing an ad buying schedule to a political committee

⁶⁹ 11 C.F.R. § 109.21(d)(1)-(3). The other three types of conduct that may satisfy the conduct standard are using a common vendor, using a former employee, and republication of campaign materials. *See* 11 C.F.R. § 109.21(d)(4)-(6). Because the allegations in the Complaint do not involve these issues, this report does not address these three types of conduct.

⁷⁰ 11 C.F.R. § 109.21(d)(2). The "material involvement" prong contains a safe harbor exempting publicly available information, placing the burden on Respondents to demonstrate that the "material" information was "obtained from a publicly available source." *See id.*; Coordinated Communications E&J at 33,205. For the reasons explained above in Part III(A), we conclude that the Respondents did not meet that burden here.

⁷¹ Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 433 (Jan. 3, 2003) (explanation and justification) (emphasis added) ("Coordinated and Independent Expenditures E&J").

1 without any explanation may constitute material involvement in the committee's subsequent
2 communications.⁷²

3 There is reason to believe that the NRCC's involvement was material to "decisions
4 regarding specific aspects of" communications targeting districts for which it previously
5 provided polling information.⁷³ By posting polling results for certain races at certain times, the
6 NRCC may have been signaling to outside groups that specific races were safe or in need of
7 intervention. And the polling results themselves were valuable information regarding the status
8 of candidates in races all over the country. If the NRCC's postings spurred the outside groups to
9 target specific races at certain times, it would constitute material involvement regarding, at a
10 minimum, the communications' "intended audience," and might also have been material to their
11 content, timing, and type.

12 Respondents minimize the materiality of the NRCC's Twitter postings, contending that
13 they "reveal nothing more than the fact that the NRCC identifies competitive districts and
14 conducts polling in those districts," and that it was otherwise apparent that certain races were
15 competitive and of specific interest to the NRCC.⁷⁴ Although it admits that its staffers reviewed
16 the information,⁷⁵ AAN asserts that it was "of little significance" and that it and other "publicly
17 available polling data did not dictate AAN's independent expenditure decisions," but were
18 instead "used for the limited purpose of checking the status of a race from different perspectives

⁷² See *id.* at 434.

⁷³ *Id.* at 433.

⁷⁴ See, e.g., Walsh Aff. ¶¶ 19-21; American Crossroads Resp. at 3-4; NRCC Resp. at 9-10.

⁷⁵ AAN Resp. at 4.

1 as additional data-points to compare against AAN's own polls."⁷⁶ These arguments imply that
2 for the NRCC's involvement to be considered "material," it must have been the "but for" cause
3 of the ultimate communications — in other words, that without the posted polling results, AAN
4 and American Crossroads would not have paid for communications targeting those districts. The
5 Commission expressly considered and rejected such "a 'but-for' test, which would require proof
6 that the communication would not have occurred *but for* the material involvement of the . . .
7 political party committee," declining to "adopt[] this approach or any similar requirement of
8 direct causation in its final rules."⁷⁷

9 Likewise, the fact that the Complaint does not include examples of specific
10 communications that the NRCC is alleged to have coordinated with the outside groups does not
11 bear on whether the parties' activities satisfy the conduct standard. The Commission has
12 clarified that the NRCC's involvement need not be "traced directly to one specific
13 communication," and instead "is material to a decision regarding a particular communication if
14 that communication is one of a number of communications" and the NRCC's involvement was
15 material to "decisions regarding the strategy for those communications."⁷⁸

16 The current record indicates that at the very least the NRCC's provision of polling data
17 may have been material to AAN and American Crossroads's decisions regarding certain aspects
18 of their reported communications in the relevant districts, including their timing, frequency, and

⁷⁶ *Id.*

⁷⁷ Coordinated and Independent Expenditures E&J at 433-34; *see also, e.g., United States v. Moore*, 612 F.3d 698, 701 (D.C. Cir. 2010) ("We now join the other circuits in holding a statement is material if it has a *natural tendency to influence, or is capable of influencing*, either a discrete decision or any other function of the agency to which it was addressed.") (emphasis added).

⁷⁸ Coordinated and Independent Expenditures E&J at 434. The Commission explained that "[f]or example, if a candidate is materially involved in a decision about the content or timing of a 10-part advertising campaign, then each of the 10 communications is coordinated without the need for further inquiry into the decisions regarding each individual ad on its own." *Id.*

1 intended audience, and therefore that there is reason to believe the conduct prong is satisfied.
2 Because the "factual determination of whether a candidate or committee's involvement is
3 'material' must be made on a case-by-case basis,"⁷⁹ we propose to engage in additional fact-
4 finding to determine the full scope of the NRCC's involvement and to further assess the
5 materiality of its information to the outside spending groups who reviewed it.

6 b. Substantial Discussion

7 The conduct prong of the coordinated communications test is also satisfied if the
8 communication was produced, created, or distributed after at least one substantial discussion
9 about the communication between the payor and the political party committee or its agent.⁸⁰ A
10 discussion is "substantial" if it conveys information regarding the "political party committee's
11 campaign plans, projects, activities or needs" to the group funding the communication, and "that
12 information is material to the creation, production, or distribution of the communication."⁸¹

13 As noted above in connection with the non-public nature of the posted polling data, there
14 is ample reason to conclude that the Respondents must have discussed the fact that the NRCC
15 was posting its polling results on Twitter and how to find and interpret those postings, while the
16 Respondents do not deny that any such discussions occurred.⁸² It is equally sensible to conclude
17 that the Respondents discussed the NRCC's purpose in posting polling results through such
18 unorthodox means. In addition, particularly as the NRCC posted about only a subset of

⁷⁹ *Id.* at 433.

⁸⁰ 11 C.F.R. § 109.21(d)(3).

⁸¹ *See id.* This standard contains the same safe harbor for publicly available information provided for in the "material involvement" standard. For the same reasons, we believe the Respondents have failed to meet their burden on this issue.

⁸² *See, e.g.,* Compl. at 6 ("[B]ecause the polling data was encrypted and therefore only valuable if a person knew how to decipher it, and it was only available on anonymous, unconnected Twitter pages, Respondents must have communicated at some point to come up with this illegal coordination scheme.").

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1 congressional races, the postings themselves indicated that certain candidates were or were not in
2 need of help at certain times, thus conveying information about the NRCC's "plans, projects,
3 activities, and needs." Such exchanges rise to the level of "substantial discussion" if the
4 information conveyed would be material to AAN and American Crossroads's strategies for
5 funding communications in the 2014 congressional races. Thus, for the same reasons that the
6 posting of polling data appears to satisfy the "material involvement" standard at this stage of the
7 Commission's proceeding, the parties' apparent discussions about the activity and information
8 conveyed also appears to satisfy the "substantial discussion" standard under the Commission's
9 regulations.⁸³

10 c. Request or Suggestion

11 Finally, the conduct prong is also satisfied if communications funded by AAN or
12 American Crossroads were "created, produced, or distributed at the request or suggestion of" the
13 NRCC, or if they were "created, produced, or distributed at the suggestion of" AAN or American
14 Crossroads and the NRCC "assent[ed] to the suggestion."⁸⁴ The Commission has described this

⁸³ See, e.g., Coordinated & Independent Expenditures E&J at 435 ("Material" has the meaning explained . . . in the context of the 'material involvement' standard. In other words, the substantiality of the discussion is measured by the materiality of the information conveyed in the discussion."); see also *id.* at 433 ("Many activities that satisfy the 'substantial discussion' conduct standard will also satisfy the 'material involvement' standard.").

⁸⁴ 11 C.F.R. § 109.21(d)(1). The "request or suggestion" conduct standard "is intended to cover requests or suggestions made to a select audience, but not those offered to the public generally." Coordinated and Independent Expenditures E&J at 432. The Commission has explained that a communication is not exempted from the "request or suggestion" standard "simply because a portion of a given communication was based on publicly available information" where "a candidate privately conveyed a request that a communication be made." Coordinated Communications E&J at 33,205. The same facts that reasonably suggest that Respondents' non-public interactions enabling American Crossroads and AAN to find and understand the postings may also have involved "requests or suggestions" that they review and use the polling data. And as discussed above, by posting information on anonymous Twitter accounts, and apparently directing AAN and American Crossroads to it, the NRCC provided the polling results themselves to a "select audience" and not to the general public. See also Compl. at 7.

1 standard as "encompass[ing] the most direct form of coordination, given that the candidate or
2 political party committee communicates desires to another person who effectuates them."⁸⁵

3 Respondents state that the NRCC's Twitter postings, "a series of polling numbers,"
4 cannot themselves be construed as requests or suggestions.⁸⁶ But given the many millions of
5 Tweets posted every day and the anonymity of the two accounts the NRCC used for the purpose,
6 there must have been some communication between the Respondents for AAN and American
7 Crossroads to find the postings.⁸⁷ Moreover, because the data was posted in a cryptic format, it
8 stands to reason that Respondents explained enough to allow AAN and American Crossroads to
9 interpret the postings accurately. Together these circumstances give rise to a reasonable
10 conclusion that the NRCC may have engaged in these discussions in connection with a request or
11 suggestion that the outside groups should consider the information when making expenditure
12 decisions. Respondents do not directly refute these points,⁸⁸ or explain why the NRCC posted
13 poll results on anonymous online accounts. Certainly, as with the other conduct standards, "[a]

⁸⁵ NRCC Resp. at 7 (quoting Coordinated and Independent Expenditures E&J at 432).

⁸⁶ *See, e.g., id.*

⁸⁷ *See, e.g., Compl.* at 6. The NRCC admits that staffers disseminated polling data regarding races in specific districts via the Twitter accounts at issue, and AAN admits that it reviewed the polling results. NRCC Resp. at 3; Walsh Aff. ¶ 11. American Crossroads's Response does not address whether anyone at American Crossroads was aware of the accounts, but given the specific allegations in the Complaint, the demonstrated veracity of the source as to other closely related facts, and American Crossroads's silence in this respect, there is a reasonable basis to conclude that someone at American Crossroads was so informed. Of course, an investigation may establish otherwise.

⁸⁸ Respondents do not deny the Complaint's allegations that they must have communicated about the NRCC's Twitter postings. The NRCC does not address the allegations at all. American Crossroads offers only that its two leaders did not communicate with the NRCC or AAN regarding the polling data — it does not indicate whether anyone else at American Crossroads did so, or even whether the leaders were aware of the NRCC's activities. AAN asserts that it "did not communicate with the NRCC about how Twitter polls should affect AAN's independent expenditures," AAN Resp. at 6, but provides no additional information regarding its communications with the NRCC. This denial, without more, does not counter the reasonable inference that a more general "request or suggestion" for assistance may have been made.

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determination of whether a request or suggestion has occurred requires a fact-based inquiry.”⁸⁹

We therefore propose to conduct additional fact finding to clarify the record on this issue

following a reason to believe finding of the Commission.

3. There Is Reason to Believe that Respondents’ Coordinated Communications Violated the Act

The communications at issue in this matter were reported to the Commission as

“independent expenditures” by AAN and American Crossroads, which represented that the communications were not made in cooperation, consultation, or concert with, or at the request or suggestion of any candidates, authorized committees, or political parties or agents thereof.⁹⁰ As discussed above, the two groups reported spending nearly \$12 million in independent expenditures in connection with the 2014 congressional elections, including more than \$9 million for communications in districts for which the NRCC had previously provided polling results. The Complaint asserts that the “purported ‘independent expenditures’ sponsored by AAN and American Crossroads were in fact excessive, illegal, in-kind contributions to the NRCC.”⁹¹ Coordinated communications are considered to be in-kind contributions from the group that paid for the communication to the committee with which they are coordinated.⁹² “Any person who is otherwise prohibited from making contributions or expenditures under any part of the Act or Commission regulations is prohibited from paying for a coordinated communication.”⁹³

⁸⁹ Coordinated and Independent Expenditures E&J at 431.

⁹⁰ See 52 U.S.C. § 30101(17).

⁹¹ Compl. at 2.

⁹² 11 C.F.R. § 109.21(b).

⁹³ 11 C.F.R. § 109.22.

1 AAN is registered as an incorporated entity under section 501(c)(4) of the Internal
2 Revenue Code.⁹⁴ The Act bars corporations from contributing to political committees and
3 correspondingly prohibits political committees from accepting or receiving such contributions.⁹⁵
4 We therefore recommend that the Commission find reason to believe that AAN violated the Act
5 by making prohibited corporate contributions to the NRCC, and that the NRCC violated the Act
6 by knowingly receiving corporate contributions from AAN and by failing to report the
7 contributions that it received.

8 American Crossroads is registered with the Commission as an independent expenditure-
9 only political committee, and is required to report its expenditures.⁹⁶ Following the decision in
10 *SpeechNow v. FEC*, and consistent with the Commission's guidance,⁹⁷ American Crossroads
11 submitted a letter to the Commission stating that it intended to raise funds in unlimited amounts,
12 but would not use those funds to make contributions to federal candidates or committees,
13 whether direct, in kind, or via coordinated communications.⁹⁸ We recommend that the
14 Commission find reason to believe that American Crossroads made prohibited⁹⁹ and excessive

⁹⁴ Walsh Aff. ¶ 2.

⁹⁵ See 52 U.S.C. § 30118(a).

⁹⁶ See 52 U.S.C. § 30104.

⁹⁷ See Advisory Op. 2010-09 (Club for Growth); Advisory Op. 2010-11 (Commonsense Ten).

⁹⁸ Letter from Margee Clancy, Treasurer, American Crossroads (Aug. 9, 2010).

⁹⁹ Because American Crossroads is permitted to accept corporate contributions (and does so, according to its disclosure reports filed with the Commission), any in-kind contributions that it made to the NRCC would likely violate the Act's prohibition against corporate contributions as well. See 52 U.S.C. § 30118. While this provision does not explicitly prohibit a political committee from making a corporate contribution, it was originally enacted on the premise that committees could not accept corporate contributions at all. In enforcing the ban on corporate contributions in the context of party committees using non-federal funds for federal activities, the Commission has taken the position that a political committee may violate section 30118(a) by spending or disbursing corporate funds. See MUR 3774 (Nat'l Republican Senatorial Comm.) (finding probable cause to believe that the party committee violated 2 U.S.C. § 441b (now 52 U.S.C. § 30118) by using prohibited and excessive funds for Get Out the Vote activities that benefitted federal candidates); Conciliation Agreement ¶ V, MUR 1625 (Passaic County Democratic

1 in-kind contributions to the NRCC in the form of coordinated communications that it also failed
2 to report. We further recommend that the Commission find reason to believe that the NRCC
3 violated the Act by receiving and failing to report those contributions.¹⁰⁰

4 **D. The Complaint's Allegations Are Sufficient**

5 Respondents assert that the Complaint fails to adequately allege that they violated the
6 Act, arguing that its allegations are speculative, unspecific, and "based entirely on an
7 anonymously-sourced press-report."¹⁰¹ While it is true that the Complaint bases its allegations
8 on CNN articles that rely in turn on an anonymous source, this does not render the Complaint
9 inadequate. CNN reported that the source spoke with "knowledge of the [Respondents']
10 activities,"¹⁰² and indeed, the Respondents themselves have conceded many of the same material
11 facts that the articles and Complaint attributed to that source, while failing to seek to rebut other
12 alleged facts that the Respondents would be in a position to refute if untrue.

Party) (state party committee, which used non-federal funds to make coordinated party expenditures, admitted that it violated section 441b(a) (now 30118(a)) "by using funds prohibited in connection with federal elections"). Moreover, in MUR 4788 (Cal. Democratic Party), the Commission found reason to believe that the California Democratic Party and the Democratic State Central Committee of California violated 2 U.S.C. § 441b (now 52 U.S.C. § 30118) by disbursing non-federal funds for communications expressly advocating the election of a federal candidate that either resulted in independent expenditures or in-kind contributions if coordinated with the candidate. The Commission ultimately filed suit against the respondents and obtained summary judgment that the state party committees violated section 441b (now section 30118) by using non-federal funds to make disbursements for advertisements constituting independent expenditures. *See FEC v. Cal. Democratic Party*, 2004 WL 865833, Civ. No. 03-0547 (E.D. Cal. Feb. 13, 2004).

¹⁰⁰ As discussed above, independent expenditure-only political committees such as American Crossroads and corporations such as AAN should not make any contributions to political committees like the NRCC. Even if they were authorized to make contributions, however, the amount would have been limited by the Act. Although an investigation is required to determine which communications were coordinated, if any, because the groups spent millions in connection with the congressional races at issue, even a small percentage of their total expenditures would represent excessive contributions in violation of 52 U.S.C. § 30116(a) and (f).

¹⁰¹ NRCC Resp. at 4.

¹⁰² Chris Moody, *How the GOP Used Twitter to Stretch Election Laws*, CNN (Nov. 17, 2014), <http://www.cnn.com/2014/11/17/politics/twitter-republicans-outside-groups/>.

1 For example, the source's claim that Twitter postings were made under the accounts of
2 "@BrunoGianelli44" and "@TruthTrain14" cannot be disputed. CNN published screen shots of
3 the postings, and the Respondents do not deny that they were made — in fact, AAN attached
4 copies of the postings to its Response. And Respondents concede the source's claims both that
5 NRCC employees posted polling results on anonymous Twitter accounts and that AAN
6 employees were aware of and periodically reviewed the posted information. They do not address
7 the allegations that American Crossroads employees did so as well, or the assertion the NRCC
8 must have given American Crossroads and AAN inside information to enable them to find and
9 decode the NRCC's postings. They also do not directly refute the assertion that the NRCC staff
10 posted the information with the intent to influence American Crossroads and AAN's
11 expenditures in 2014.

12 Under these circumstances, Respondents' protests that the Complaint is speculative or
13 reliant on an anonymous source miss the mark. Further, unlike the prior matters on which the
14 Respondents' argument relies, the inferences drawn in this matter are not refuted by available
15 information — the available information, including Respondents' own admissions, tends to
16 support the allegations in the Complaint.¹⁰³

17 As to the threshold sufficiency of the evidence, a reason to believe determination is not
18 conclusive that an allegation is true; rather, it recognizes the seriousness of the allegations and
19 provides an opportunity to conduct further fact finding to resolve whether in fact a violation
20 occurred. A reason-to-believe finding is therefore appropriate "in cases where the available

¹⁰³ Cf. Factual & Legal Analysis at 7-8, MUR 6679 (Jim Renacci for Congress, *et al.*) (no reason-to-believe finding where complaint drew an "inference of coordination," "not supported by any available information," and the "available information" actually refuted the allegations).

1 evidence in the matter is at least sufficient to warrant conducting an investigation."¹⁰⁴ Here, the
2 present record adequately supports the conclusion that the Respondents may have violated the
3 Act for the reasons described above. That further investigation may not yield affirmative
4 evidence of a violation or may reveal that no violation occurred does not render the allegations
5 speculative or insufficient to proceed at the reason to believe stage.¹⁰⁵

6 IV. PROPOSED INVESTIGATION

7 We propose to seek further information concerning the full scope of the NRCC's posting
8 of polling data and related information and its communications with AAN, American
9 Crossroads, or other outside groups related to those posts. We also would seek additional
10 information about AAN and American Crossroads's review of the posts, how the posted
11 information may have influenced outside groups' federal election-related expenditures, the
12 NRCC's purpose for posting the information, the cost of the relevant polls, and any public
13 communications of outside groups that may have been informed by review of the posts. We will
14 attempt to conduct our investigation through voluntary means, but recommend that the
15 Commission authorize the use of compulsory process as necessary.

16 V. RECOMMENDATIONS

- 17 1. Find reason to believe that American Crossroads and Caleb Crosby in his official
18 capacity as treasurer violated 52 U.S.C. §§ 30104(b), 30116(a), and 30118(a).
19 2. Find reason to believe that American Action Network violated 52 U.S.C.
20 §§ 30104(c)(2)(C) and 30118(a).

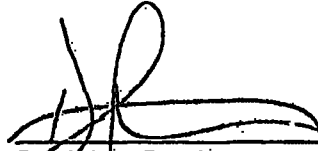
¹⁰⁴ Statement of Policy Regarding Comm'n Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007).


¹⁰⁵ See *id.* (explaining that a reason-to-believe finding is appropriate where a complaint "credibly alleges that a significant violation may have occurred, but further investigation is required to determine whether a violation in fact occurred and, if so, its exact scope").

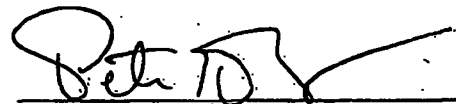
3. Find reason to believe that the National Republican Congressional Committee, and Keith Davis in his official capacity as treasurer, violated 52 U.S.C. §§ 30104(b), 30116(f), and 30118(a).
4. Approve the attached Factual and Legal Analyses.
5. Approve the use of compulsory process as necessary.
6. Approve the appropriate letters.

DATE: November 13, 2015

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